Filed 1/11/13 P. v. Grunwald CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA DAVID GRUNWALD, Defendant and Appellant.	G045905 (Super. Ct. No. 10HF1108) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

John N. Aquilina, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton, Michael T. Murphy and Charles Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Subsequent to finding defendant Joshua David Grunwald not guilty of assault with a deadly weapon as charged in count one, a jury found him guilty of the lesser included crime of misdemeanor assault, guilty of inflicting injury on a cohabitant resulting in a traumatic condition as charged in count two, guilty of making criminal threats as charged in count three, not guilty of assault with a deadly weapon as charged in count four, but guilty of the lesser included crime of misdemeanor assault and guilty of false imprisonment as charged in count five.

After the jury was excused, the court took judicial notice of defendant's burglary conviction in Arkansas, and found it to be true. The court sentenced defendant to state prison for a term of 12 years four months.

Defendant's contention there is insufficient evidence to support the court's finding his Arkansas conviction is a serious felony under California law is without merit. We affirm.

I

FACTS

Little need be said about the underlying facts because they are not relevant here. Suffice it to say that on June 28, 2010, defendant brutalized his girlfriend for 90 minutes after which she spent three days in the hospital.

In a bifurcated trial, the court admitted into evidence documents from defendant's prior conviction in Arkansas. The information filed in Arkansas alleged defendant committed "RESIDENTAL BURGLARY, CLASS B FELONY, 5-39-201 AND THEFT OF PROPERTY, CLASS B FELONY, 5-36-103, committed as follows, to wit: The said defendant, JOSHUA GRUNWALD, in Carroll County, Arkansas, did unlawfully, [¶] 1) On or about March 25, 2000, did enter or remain unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment, to wit: entered residence of Terry Eichor with

the purpose of committing a theft. . . . [¶] 2) On or about March 25, 2000, did knowingly take or exercise unauthorized control over or make an unauthorized transfer of interest in the property of another person with the purpose of depriving the owner thereof, to wit: took property in excess of $2,500.00 belonging to Terry Eichor. [¶] **against the peace and dignity of the State of Arkansas**."

A document entitled "PLEA AGREEMENT AND ORDER" was also admitted. In relevant part, it states: "DEFENDANT AGREES TO PLEAD (guilty) TO: [¶] RESIDENTIAL BURGLARY, CLASS B FELONY, 5-39-201 AND THEFT OF PROPERTY, CLASS B FELONY, 5-36-103"

The court stated: "Having received each and every one of these items that have been admitted into evidence, and having reviewed each and every one, the court now finds that the allegation of prior conviction for a serious and violent felony; specifically, a strike offense within the meaning of Penal Code section 667 [subdivisions] (d) and (e) and 1170.12 [subdivisions] (b) and (c)(1); and further, that the allegation pursuant to Penal Code section 667 [subdivision] (a)(1), based on the same case, has been proven to the court beyond a reasonable doubt. I do find those allegations of priors are true." (Unless otherwise specified, all statutory references are to the Penal Code.)

II

DISCUSSION

Defendant contends there is insufficient evidence to support the trial court's finding his prior conviction in Arkansas is a serious felony under California law. He argues Arkansas's statutes leave open certain possibilities which prevent California from considering his prior as a strike under the "Three Strikes" law. Defendant further contends the Arkansas definition of a residence includes a vehicle, whereas in California it does not.

Pursuant to section 667, subdivision (d)(2), a strike conviction includes convictions from other jurisdictions that include all of the elements of a violent or serious felony as defined in sections 667.5, subdivision (c) or 1192.7, subdivision (c). "A defendant whose prior conviction was suffered in another jurisdiction is, therefore, subject to the same punishment as a person previously convicted of an offense involving the same conduct in California." (*People v. Myers* (1993) 5 Cal.4th 1193, 1201.) In making its determination whether or not a conviction from another jurisdiction qualifies as a strike in California, the court may consider "'the entire record of conviction.'" (*Id.* at p. 1200.) "[W]hen the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law." (*People v. Guerrero* (1988) 44 Cal.3d. 343, 355.)

"Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter 'inhabited' means currently being used for dwelling purposes, whether occupied or not." (§ 459.)

"Every person who shall feloniously steal . . . the personal property of another . . . is guilty of theft." (§ 484, subd. (a).) "[T]he language in section 484, subdivision (a), referring to an intent to 'feloniously steal,' reasonably construed, adopted the common law intent requirement. That requirement, although often summarized as the intent to deprive another of the property permanently, is satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment. The rule of lenity does not compel a different result." (*People v. Avery* (2002) 27 Cal.4th 49, 58.) "In *Davis*, we discussed various factual circumstances involving arguably temporary takings that courts and commentators have found constitute theft. We discerned 'three relevant categories of cases holding that the requisite intent to steal may be found even though the defendant's primary purpose in taking the property is not to deprive the owner permanently of possession: i.e., (1) when the defendant intends

to "sell" the property back to its owner, (2) when the defendant intends to claim a reward for "finding" the property, and (3) when . . . the defendant intends to return the property to its owner for a "refund."' [Citation.]" (*Id.* at p. 55.)

Arkansas Code Annotated section 5-39-201 states: "(a)(1) A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment. [¶] (2) Residential burglary is a Class B felony." Arkansas Code Annotated section 5-39-101 states in part: "(4)(A) 'Residential occupiable structure' means a vehicle, building, or other structure: [¶] (i) in which any person lives . . . ."

Arkansas Code Annotated section 5-36-103 states: "(a) A person commits theft of property if he or she knowingly: [¶] (1) Takes or exercises unauthorized control over or makes an unauthorized transfer of an interest in the property of another person with the purpose of depriving the owner of the property; or [¶] (2) Obtains the property of another person by deception or by threat with the purpose of depriving the owner of the property." Arkansas Code Annotated section 5-36-101 states in part: "(4) 'Deprive' means to: [¶] (A) Withhold property or to cause it to be withheld either permanently or under circumstances such that a major portion of its economic value, use, or benefit is appropriated to the actor or lost to the owner; [¶] (B) Withhold property or to cause it to be withheld with the purpose to restore it only upon the payment of a reward or other compensation; or [¶] (C) Dispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely."

"Because the Tennessee burglary statute requires the intent to commit any felony, and because in 1982 certain conduct such as a second conviction for marijuana possession, or sodomy, were felonies in Tennessee but not in California, [the defendant] contends the broader intent requirement of Tennessee's second degree burglary statute

leaves open the possibility that he acted with an intent that would not have qualified as a felony for purposes of California's burglary law. That theoretical possibility is belied by the record, however. [The defendant] was originally indicted for first degree burglary in an indictment that alleged he broke into and entered someone's house with the intent to take and carry away the owner's personal property and to convert those items to his own use and deprive the owner of their use. In short, [the defendant] was charged with entering someone's home in order to commit at least petit larceny, which meets the definition of first degree burglary in California. [Citations.] Because the only difference between first and second degree burglary in Tennessee was whether the crime occurred during the night or the day, and because California's burglary statute does not include such a distinction, [the defendant's] eventual conviction of second degree burglary based on those charges does not preclude a trier of fact from finding that the Tennessee conviction qualified as a serious felony under section 1192.7, subdivision (c)(18)." (*People v. Towers* (2007) 150 Cal.App.4th 1273, 1284.)

Defendant says "the Arkansas element that the accused enter or remain inside the occupiable structure for the purpose of committing an offense punishable by a term of imprisonment is not equivalent to the California element that the entry be done for the purpose of committing a felony offense." (Capitalization omitted.) Here the charging allegation filed in Arkansas specifically alleges defendant "entered residence of Terry Eichor with the purpose of committing theft," and the plea agreement established defendant pled guilty to that charge. Just as in *Towers*, when comparing the out-of-state statute with California's, and when also considering the actual facts in the entire record of conviction, there is no doubt defendant's out-of-state crime falls squarely within the definition of first degree burglary in California.

Defendant raises another theoretical possibility. He argues under Arkansas law, a residence may include a vehicle. But what Arkansas law actually says is that a

"residential occupiable structure" may include a vehicle where someone lives. It does not say a residence includes a vehicle. Here the charging document states "residence," a much more specific term than "residential occupiable structure," the term used in the Arkansas statute. The word "residence" combined with the description that it was Terry Eichor's "residence" connotes the crime was committed in Terry Eichor's dwelling place.

Our dissenting colleague contends that *Julian v. State* (1989) 298 Ark. 302 [767 S.W.2d 300] and *Barksdale v. State* (1977) 262 Ark. 271, 274 [555 S.W.2d 948, 950] require reversal. But those holdings are distinguishable from the situation we have here because in both of those cases the issue was whether the structure was "occupiable" or not. Here we know the structure was "occupiable" because Terry Eichor dwelled there when the crime was committed.

Another argument defendant makes is because the targeted offense in Arkansas was theft, and the Arkansas statute does not contain all of the elements of California's theft statute, Arkansas's statute is not the equivalent of California's. Specifically he contends an intent to permanently deprive is not a requirement in Arkansas, but it is a required element in California. Under *People v. Avery*, *supra*, 27 Cal.4th 49, this argument fails.

The facts from defendant's Arkansas conviction are that he "entered residence of Terry Eichor with the purpose of committing a theft" and that he "took property in excess of $2,500.00 belonging to Terry Eichor." As in *Towers*, the specific factual allegations contained in the Arkansas information and guilty plea agreement form provide sufficient basis for us to conclude defendant's prior conviction in Arkansas equates to a conviction of a serious felony in California.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

I CONCUR:

THOMPSON, J.

ARONSON, J., Dissenting.

I dissent from the majority's conclusion substantial evidence supports the finding defendant Joshua Grunwald's prior Arkansas conviction for burglary qualifies as a serious felony under California Law. A person commits a burglary in Arkansas by entering an "occupiable" structure, which Arkansas courts define as encompassing uninhabited dwellings. A residential burglary in California, however, requires the burglarized building to be an inhabited dwelling. Because the record of conviction does not establish the building Grunwald entered was inhabited, we must presume under the least adjudicated elements test that the building was an occupiable but uninhabitated structure, which does not satisfy California's burglary statute. Accordingly, I would reverse the trial court's finding Grunwald suffered a prior serious felony conviction.

In determining whether an out-of-state prior conviction involved conduct that would constitute a serious felony if committed in California, the trier of fact may consider the entire record of conviction. (*People v. Avery* (2002) 27 Cal.4th 49, 53.) The record of conviction is defined as "'those record documents reliably reflecting the facts of the offense for which the defendant was convicted.'" (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1126.) "On an appellate challenge to a finding that a prior conviction was a strike, where the prior conviction is for an offense that can be committed in multiple ways, one or more of which would not qualify it as a strike, and *if it cannot be determined from the record that the offense was committed in a way that would make it a strike*, a reviewing court must presume the offense was not a strike." (*People v. Watts* (2005) 131 Cal.App.4th 589, 596.)

To prove Grunwald's prior Arkansas conviction for burglary corresponded to California's burglary statute, the prosecution introduced the Arkansas charging document showing Grunwald was accused of committing residential burglary and theft. Specifically, the document alleged Grunwald on March 25, 2000, "did enter or remain

unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment, to wit: entered residence of Terry Eichor with the purpose of committing a theft . . . . [¶] . . . On or about March 25, 2000, did knowingly take or exercise unauthorized control over or make an unauthorized transfer of interest in the property of another person for the purpose of depriving the owner thereof, to wit: took property in excess of $2,500.00 belonging to Terry Eichor." The prosecution also introduced a "Plea Agreement and Order" reflecting Grunwald's guilty plea to both charges. The prosecution produced no other evidence, such as a preliminary hearing transcript or a factual basis for Grunwald's guilty plea. The trial court found Grunwald's Arkansas burglary conviction qualified as a serious felony under the "Three Strikes" law and as five-year enhancement under Penal Code section 667, subdivision (a)(1).

First degree residential burglary in California requires proof the residence was inhabited. "To prove first degree burglary of an inhabited dwelling, the People must present evidence that the house is 'currently being used for dwelling purposes, whether occupied or not.' (Pen. Code, § 459.) What this means is that a dwelling is inhabited if the occupant is absent but intends to return and to use the house as a dwelling." (*People v. Ramos* (1997) 52 Cal.App.4th 300, 302, fn. omitted.) In contrast, a person commits a residential burglary under section 5-39-201 of the Arkansas Code of 1987 Annotated "if he or she enters or remains unlawfully in a residential *occupiable* structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment." (Italics added.) Thus, Arkansas's residential burglary statute applies to an "occupiable structure" rather than an "inhabited dwelling."

Julian v. State (1989) 298 Ark. 302 [767 S.W.2d 300], illustrates the point. There, the defendant was convicted of burglarizing an unrented mobile home the owner used as storage for business items. The Arkansas Supreme Court rejected the defendant's

contention insufficient evidence supported his burglary conviction because the structure he entered was not "occupiable." The court explained the definition of "occupiable" did not depend on whether it is being used for a nonresidential purpose "as long as 'the nature of the premise' is that it is 'occupiable.'" (*Id.* at p. 304; see also *Barksdale v. State* (1977) 262 Ark. 271, 274 [555 S.W.2d 948, 950] ["The fact the [university student union] building was used for social activities, religious sessions, and classroom meetings clearly demonstrated that the building was an 'occupiable structure'"].)

The majority apparently assumes the Arkansas prosecutor's use of the word "residence" in the Arkansas charging document corresponded to California's requirement that residential burglary applies only to an inhabited dwelling. The possibility the word "residence" was used in this manner falls short of the substantial evidence necessary to support the trial court's finding. Substantial evidence is defined as """"evidence which is reasonable, credible, and of solid value—such that a trier of fact could find the defendant guilty beyond a reasonable doubt."""" (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) """"A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."""" (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

Of course, it is possible the burglarized structure was an inhabited dwelling, but the possibility the victim of the Arkansas burglary inhabited the structure is no substitute for facts. The evidentiary void leaves open other possibilities. For instance, when an occupant moves out of a dwelling without intending to return, "the premises become 'uninhabited,'" even if property is left behind. (*People v. Hughes* (2002) 27 Cal.4th 287, 354; *People v. Cardona* (1983) 142 Cal.App.3d 481, 483-484 [house uninhabited if no longer used for dwelling purposes].) To move past speculating about possibilities, some evidence is required. (See *People v. Moenius* (1998) 60 Cal.App.4th 820, 824-825 [defendant's guilty plea to allegation he burglarized the "'residence and

building occupied by [the victim]'" sufficient to show burglary of an inhabited dwelling].) The charging document's reference to the victim's residence "'merely raises a strong suspicion of the defendant's guilt [and] is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Kunkin* (1973) 9 Cal.3d 245, 250; see *People v. Moore* (2011) 51 Cal.4th 386, 406 ["That an event *could* have happened, however, does not by itself support a deduction or inference it did happen"].)

Thus, the charging document and Grunwald's guilty plea shed no light on whether the burglarized structure was an inhabited dwelling, as required under California law. We must therefore presume under the least adjudicated elements test the structure was not an inhabited dwelling. Consequently, Grunwald's prior Arkansas conviction did not constitute a serious felony under California law. I therefore dissent from the majority's finding Grunwald suffered a serious prior felony conviction.

ARONSON, J.